Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593
	)	

Reply Comments of CompTel, Global Crossing North America, Inc. and NuVox Communications.

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CompTel, Global Crossing North American, Inc., on behalf of its U.S. operating subsidiaries ("Global Crossing"), and NuVox Communications ("NuVox"), submit their reply comments in the above-captioned proceedings.

Introduction and Summary

The initial comments confirm that the BOCs have utilized pricing flexibility to increase special access rates and to keep competition down by imposing anticompetitive terms and conditions in special access discount plans. The comments provide irrefutable evidence that BOCs have increased rates, often substantially, for services subject to pricing flexibility. Rather than address the reasonableness of their filed tariff rates, the BOCs instead resort to flawed and irrelevant measures of average revenue that provide no insight into the key question of whether competition is driving special access rates to forward looking costs. On this question, the BOCs refuse to provide any information. As Dr. Joseph Farrell, the former Chief Economist of the Commission explains, the Commission can, however, reasonably assess that question by comparing special access rates with prices for comparable facilities that are based on forward looking costs--

competitor rates and UNE rates. Such a comparison demonstrates that special access rates remain far above forward looking costs, and competition has had little, if any, restraining affect.

As explained by Dr. Farrell, increases in base rates also enhance the ability of BOCs to induce customers into volume and term plans with anticompetitive, exclusionary provisions. These plans can make it virtually impossible for new entrants to compete for existing BOC special access customers. BOC plans also include patently illegal terms such as growth discounts and provisions designed to prevent similarly situated customers from opting into the plan.

Ultimately, the BOCs' claim is that there is sufficient competition to deregulate special access. Those claims do not square with the facts. Various consumers of special access services, from end users to wireless companies to CLECs and IXCs, uniformly report that they remain wholly reliant on BOC special access services to more than 90% of locations.

The Commission has embarked on a sound course of reviewing its pricing flexibility rules and should move quickly to reinitialize rates and eliminate the BOCs' ability to lock up demand through exclusionary and unlawful contract requirements.

Argument

I. There Is No Evidence that Competition Is Driving Bell Company Special Access Rates Toward Long Run Cost

Based on evidence submitted to the Commission in this and other proceedings, there can no longer be any question that BOCs have increased rates for services subject to pricing flexibility. Pricing flexibility rates often significantly exceed the BOCs' price cap rates. Unable to refute this evidence, the BOCs proffer evidence not of any price declines, but of purported declines in average revenues that they claim are the result of price declines. The BOCs' average revenue calculations, however, are flawed and shed no light on market power, which requires an assessment of prices relative to costs, and in particular forward looking costs.

Additionally, the BOCs suggest that the Commission ignore filed rates on the specious ground that carriers really do not pay those rates anyway. These arguments are wrong factually and legally irrelevant. Carriers do, in fact, pay filed rates. And even base tariff discount rates are higher under pricing flexibility than under price caps. Moreover any suggestion that filed base tariff rates can be ignored because some carriers enter plans providing additional discounts is irrelevant because filed rates must be just and reasonable, even if some carriers receive further discounts. The BOCs mount no serious defense that their filed rates comply with this fundamental statutory requirement.

A. Increases in BOC Tariffed Rates for Special Access Services in Pricing Flexibility Areas Have Been Substantial and Sustained

Bell company filed rates for special access services subject to pricing flexibility have increased in most cases, and in virtually no case have they declined below price cap levels. The record unequivocally supports this conclusion, and the BOCs admit as much. BellSouth, for example, attached page after page of pricing flexibility rates compared to price cap rates – data that shows increases between 2001 and 2004 of between 6.9% and 9.2% in their basic DS1 and DS3 special access rates.[1/] SBC concedes that their "Phase

[1/] *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of BellSouth, at Attachment 1 (filed June 13, 2005) ("*BellSouth Comments*").

II basic tariff rates are somewhat higher than those in price cap MSAs . . . ."[2/] Verizon admits "the fact that some [special access] rates have increased (particularly in Phase II areas)."[3/]

Other commenters provide the Commission with extensive evidence that "all four BOCs have increased prices for DS-1 circuits, DS-3 circuits, or both in every region for which they have received pricing flexibility."[4/] The Ad Hoc Telecommunications Users Committee highlights examples of post-pricing flexibility special access rate increases of 8% by BellSouth, 15% by Verizon, 21% by SBC, and 56% by Qwest[5/] and attaches an extensive tariff-by-tariff review of changes in special access rates through 2004, prepared by Dr. M. Joseph Stith, that concluded that month-to-month rates in pricing flexibility areas increased for every one of the BOCs.[6/] The Ad Hoc Telecommunications Users Committee's own review of currently published tariffs shows that the BOC price hikes identified in the Stith declaration remain in effect.[7/] T-Mobile's analysis of its special

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2/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of SBC Communications, Inc., Declaration of Parley C. Casto on Behalf of SBC Communications, Inc., at 40, n.49 (filed June 13, 2005) ("*Casto Declaration*").

3/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of Verizon, at 22 (filed June 13, 2005) ("*Verizon Comments*").

4/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of the Ad Hoc Telecommunications Users Committee, at 18 (filed June 13, 2005) ("*Ad Hoc Telecomm Comments*").

5/ *Id.* at 21.

6/ *Id.* at 22 (*citing* Unbundled Access to Network Elements, WC Docket No. 04-313, Reply Comments of AT&T Corp., Declaration of M. Joseph Stith, at 6 (filed Oct. 19, 2004) ("*Stith Declaration*")).

7/ *Ad Hoc Telecomm Comments* at 22.

access costs in pricing flexibility areas found that prices charged by BOCs rose by 15% to 62% between 2002 and 2005.[8/]

Time Warner Telecom notes a study published by two FCC economists in 2004 that surveyed BOC tariffed rates and found rates had increased for every BOC in almost every pricing flexibility area.[9/] CompTel provided data showing that prices for individual rate elements of DS1 circuits increased in price flexibility areas of each of the four BOCs.[10/] XO Communications cites two economic studies[11/] that concluded, after examining available data, that "RBOCS have taken advantage of pricing flexibility to raise special access rates in the geographic areas no longer subject to price caps."[12/] WilTel similarly provides evidence of BOC special access price increases, including

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8/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of T-Mobile USA, Inc., Declaration of Chris Sykes at 3 (filed June 13, 2005) ("*Sykes Declaration*").

9/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of Time Warner Telecom, at 16 (filed June 13, 2005) ("*Time Warner Comments*") (*citing* Noel D. Uri and Paul R. Zimmerman, Special Access Service and Its Regulation in the United States, Info – The Journal of Policy, Regulation and Strategy for Telecommunications, Feb. 2004, at 156-57).

10/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of CompTel/ALTS, Global Crossing North America, Inc., and NuVox Communications, Declaration of Janet S. Fischer on Behalf of Global Crossing North America, Inc., at 9-12 (filed June 13, 2005) ("*Fischer Declaration*").

11/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of XO Communications, Inc., at 6-7 (filed June 13, 2005) ("*XO Comments*") (*citing* George S. Ford and Lawrence J. Spiwak, Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets (Phoenix Center Policy Paper No. 18, 2003)); Letter from Thomas Cohen, KDW Group, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313 (filed Oct. 5, 2005) (attaching the Mayo/MiCRA/Bates White Economic Impairment Analysis ("*MMBW Analysis*")).

12/ *XO Comments* at 7 (*quoting MMBW Analysis* at 60, ¶ 116).

examples of price increases exceeding 100%.[13/] As BT Americas points out, this should not be news to the Commission, BOC rate hikes for special access services in pricing flexibility areas have been amply documented to the Commission in other proceedings.[14/]

Faced with incontrovertible evidence of increase in filed rates, the BOCs claim that these rates are not actually being paid by customers. Instead they assert that the real rates customers pay are their discounted rates.[15/] Both BellSouth and Verizon, for example, claim that the vast majority of their customers purchase special access under discount plans.[16/]

Rate increases in pricing flexibility areas, however, have not been limited to month-to-month rates. Many filed rates for discount programs are also higher under

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13/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Initial Comments of WilTel Communications, LLC, Declaration of Mark Chaney, at 2 (filed June 13, 2005) ("*Chaney Declaration*").

14/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of BT Americas Inc.*, at 4 (filed June 13, 1005) ("*BT Americas Comments*") (*citing* Unbundled Access to Network Elements, WC Docket No. 04-313, Comments of AT&T Corp., at 105-06 (filed Oct. 4, 2004); *Unbundled Access to Network Elements*, WC Docket No. 04-313, *Comments of AT&T Corp., Declaration of Alan G. Benway, Robert G. Holleron, Jeffrey King, Michael E. Lesher, Michael C. Mullan, and Maureen Swift on Behalf of AT&T Corp.*, at 4, 12-13, ¶¶ 13, 33, 36 (filed Oct. 4, 2004); *Unbundled Access to Network Elements*, WC Docket No. 04-313, Comments of AT&T Corp., *Declaration of M. Joseph Stith*, Attachments 1 and 2 (filed Oct. 4, 2004); *Unbundled Access to Network Elements*, WC Docket No. 04-313, *Reply Comments of AT&T Corp.*, at 85-86 (filed Oct. 19, 2004)).

15/ *See*, *e.g.*, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of SBC Communications Inc.*, at 21 (filed June 13, 1005) ("*SBC Comments*") ("[B]ase tariff rates do not remotely reflect the average price the customer actually pays."); *BellSouth Comments* at 16 (claiming that tariffed month-to-month rates "do not represent the prices typically paid by customers purchasing BellSouth's special access services" because of the "numerous discounts available").

16/ *BellSouth Comments* at 16-17 (reporting that 92% of BellSouth's DS1 revenues and 75% of its DS3 revenues are attributable to discount plans); *Verizon Comments* at 11-12 (reporting that 85% of Verizon's special access demand is met through discount plans).

pricing flexibility. Tables 1-3, below, [17/] demonstrate that filed base tariff rates are higher under pricing flexibility than under price caps, whether those base rates are month-to-month or base tariff discount plans.[18/]

[17/] Data for the tables are drawn from: BellSouth Corp. Tariff FCC No. 1 at 9th revised Page 7-144.1, 14th Revised Page 7-146, 13th Revised Page 7-146.2, 1st Revised Page 23-80, 1st Revised Page 23-163, Original Page 23-165; Qwest Corp. Tariff FCC No. 1 at 3rd Revised Page 7-347, 5th Revised Page 7-354, 5th Revised Page 7-355, 5th revised Page 7-356, Original Page 17-91, 3rd Revised Page 17-98, 2nd Revised Page 17-99, 2nd Revised Page 17-101; SBC Corp., Ameritech Tariff FCC No. 2 at 44th Revised Page 411, 10th Revised Page 411.2, 8th Revised Page 411.4, 2nd Revised Page 755, 1st Revised Page 757, 1st Revised Page 759 (data are for Michigan); SBC Corp., Pacific Bell Tel. Co. Tariff FCC No. 1 at 18th revised Page 7-172, 10th Revised Page 1-179, 5th Revised Page 7-192, 4th Revised Page 31-41, 4th Revised Page 31-48, 4th Revised Page 31-57.1; SBC Corp., Southwestern Bell Tel. Co. Tariff FCC No. 73 at 23rd Revised Page 7-185, 13th Revised Page 7-189.13, 20th Revised Page 7-189.14, 9th Revised Page 7-189.15, 10th Revised Page 7-189.17, 3rd Revised Page 39-66, 4th Revised Page 39-67, 3rd Revised Page 39-84, 3rd Revised Page 39-85, Original Page 39-86, 3rd Revised Page 39-88, Original Page 39-89 (data are for Texas); Verizon Corp. Tariff FCC No. 1 at 6th Revised Page 7-250, 5th Revised Page 7-264, 7th Revised Page 7-276,2nd Revised Page 7-276.1, 7th Revised Page 7-278, 2nd Revised Page 7-278.1.

[18/] The tables are consistent with the evidence that both month-to-month and discount rates have increased. Several carriers, for example, resubmitted the study initially conducted by Dr. M. Joseph Stith for AT&T, *Stith Declaration*, which comprehensively compared pricing flexibility rates with price cap rate for both month-to-month and for discount. *See also Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of ATX Communications Inc., Bridgecom International, Inc., Broadview Networks, Inc., Pac-West Telecomm, Inc., US LEC Corp., and U.S. Telepacific Corp. d/b/a/ Telepacific Communications, at 10-11 (filed June 13, 1005) ("*ATX Comments*"); *Ad Hoc Telecomm Comments* at 22. Sprint's review of BOC long-term discount plans "found only 3 cases in which the 2004 price flex rates were lower than the price cap rates." *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of Sprint Corporation*, at 4-5 (filed June 13, 1005) ("*Sprint Comments*").

Table 1 - Month-to-Month

Month-to-Month: DS1: Zone 1: 10-mile Circuit	Price Cap				Pricing Flexibility				Difference
	Channel Termination	Mileage		Monthly Total	Channel Termination	Mileage		Monthly Total	
		Fixed Rate	Per Mile			Fixed Rate	Per Mile		
BellSouth	$168.00	$75.00	$16.00	$571.00	$168.00	$85.00	$18.00	$601.00	5%
Qwest	$112.30	$70.00	$10.00	$394.60	$165.00	$92.00	$16.00	$582.00	47%
SBC: Ameritech	$265.00	$99.00	$27.00	$899.00	$267.00	$99.00	$27.00	$903.00	0%
SBC: Pacific Bell	$129.00	$48.00	$10.00	$406.00	$152.00	$62.50	$12.75	$494.00	22%
SBC: Southwestern Bell	$181.00	$75.00	$16.00	$597.00	$215.00	$75.00	$16.00	$665.00	11%
Verizon	$197.00	$46.66	$19.17	$631.83	$225.63	$55.00	$27.37	$779.96	23%

Table 2 - 36-month term

36-Month Commitment: DS1: Zone 1: 10-mile Circuit	Price Cap				Pricing Flexibility				Difference
	Channel Termination	Mileage		Monthly Total	Channel Termination	Mileage		Monthly Total	
		Fixed Rate	Per Mile			Fixed Rate	Per Mile		
BellSouth	$124.00	$70.00	$4.90	$367.00	$126.00	$70.00	$10.00	$422.00	15%
Qwest	$102.53	$59.50	$8.50	$349.56	$130.00	$85.00	$12.00	$465.00	33%
SBC: Ameritech	$108.00	$36.00	$13.40	$386.00	$108.00	$38.60	$15.35	$408.10	6%
SBC: Pacific Bell	$121.00	$42.00	$9.75	$381.50	$112.50	$40.00	$9.25	$357.50	-6%
SBC: Southwestern Bell	$112.00	$39.00	$12.25	$385.50	$115.00	$50.00	$16.80	$448.00	16%
Verizon	$147.75	$38.89	$14.38	$478.19	$169.22	$41.25	$20.53	$584.99	22%

Table 3 - 60 month term.

60-Month Commitment: DS1: Zone 1: 10-mile Circuit	Price Cap				Pricing Flexibility				Difference
	Channel Termination	Mileage		Monthly Total	Channel Termination	Mileage		Monthly Total	
		Fixed Rate	Per Mile			Fixed Rate	Per Mile		
BellSouth	$120.00	$65.00	$3.90	$344.00	$123.00	$65.00	$8.00	$391.00	14%
Qwest	$89.84	$52.50	$7.50	$307.18	$110.00	$80.00	$10.00	$400.00	30%
SBC: Ameritech	$98.00	$21.75	$11.20	$329.75	$98.00	$25.30	$19.50	$416.30	26%
SBC: Pacific Bell	$113.00	$37.00	$9.50	$358.00	$100.00	$35.00	$8.50	$320.00	-11%
SBC: Southwestern Bell	$90.00	$34.00	$8.85	$302.50	$100.00	$47.50	$15.96	$407.10	35%
Verizon	$128.05	$34.45	$10.19	$392.45	$146.66	$35.75	$14.00	$469.07	20%

The BOCs are also wrong to suggest that carriers do not pay filed rates. Not all carriers have entered into individualized contracts tariffs and many pay filed rates, either month-to-month rates or base discount rates. The BOCs admit that a substantial percentage of customers pay month-to-month rates. As reported by Verizon, fifteen percent of its special access sales are month-to-month, and BellSouth notes that 25% of its DS3 special access revenue is month-to-month.[19/]

Base rate increases have pernicious effects. Increasing month-to-month rates enhances BOCs' bargaining power to impose exclusionary terms and conditions in discount plans.[20/] Moreover, increases in month-to-month rates adversely affect carriers that are in discount plans. As noted by Time Warner Telecom, increases in filed month-to-month tariff rates in pricing flexibility areas effectively erode the value of discount plans and result in a price increase despite enrollment in a BOC discount plan.[21/] As Dr. Farrell notes, "when a monopoly offers proportional or relative discounts off its undiscounted prices in order to induce customers to agree to exclusionary provisions, it has an incentive to set the undiscounted price above even the monopoly level (because, rather than simply deterring demand, an increase above the monopoly level steers customers in discount plans and also bring the discount prices closer to the monopoly level.)"[22/]

19/ *Verizon Comments* at 22; *BellSouth Comments* at 17.

20/ *Reply Declaration of Joseph Farrell* on Behalf of CompTel at 2, ¶ 4 (filed as an attachment to this document) ("*Farrell Declaration*").

21/ Time Warner's participation in a discount plan did not protect it from a 19% increase in Qwest's month-to-month rate for DS1 services because the discount plan simply gave Time Warner 20% off of base rates. When base rates increased, so did Time Warner's costs. *See Time Warner Comments* at 18-19.

22/ *Farrell Declaration* at 2, ¶ 4.

Any suggestion that the Commission can ignore filed rates because of the availability of overlay discount plans is also problematic because those plans are not transparent as to the price paid, typically calling for additional discounts, either in the form of specified percentages or rebates, from the carrier's total spend. Additionally, the overlay plans often are the most egregious in terms of incorporating exclusionary, anticompetitive, and unlawful provisions, an issue that is discussed further in Part III, below.

Ultimately, the BOCs' claim that the Commission should ignore filed rates founders because filed rates must be just and reasonable, and it is no defense to simply claim that some carriers may opt into plans providing additional discounts. The Communications Act provides that "[a]ll charges . . . for . . . communication service, shall be just and reasonable and that any such charge . . . that is unjust or unreasonable is hereby declared to be unlawful."[23/] The Commission must thus assess the reasonableness of all rates on file.

In this regard, the BOCs have mounted no defense of their filed rates. Instead, they claim that competition disciplines their prices – a claim they support not by any reference to actual filed tariff prices, but by pointing to purported declines in special access revenues as measured on a per unit basis. The flaws inherent to this approach are addressed next.

[23/] 47 U.S.C. § 201(b).

B. BOCs' Average Revenue Per Unit Is a Flawed Metric That Avoids the Relevant Question of Whether Prices Are Trending Toward Forward Looking Costs.

Despite the irrefutable evidence that BOC filed special access prices have increased (or at least have not decreased) in pricing flexibility areas, the BOCs claim, to the contrary, that overall special access prices have declined.[24/] BOCs, however do not provide actual evidence of any price declines. Instead, they provide evidence purporting to show that their average revenue has declined, which they equate with price declines and with lack of market power.[25/] As Dr. Farrell explains however, the BOCs' syllogism that lower average revenues means lower prices means no market power founders at each step.[26/] Average revenues are a flawed method for evaluating prices trends, as Verizon's own expert, Dr. William Taylor has previously recognized.[27/] Most critically, however, declining average revenues, even if they correlated with price trends, provide no information about market power or whether the Commission's goal of driving special

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24/ *See, e.g.*, *Verizon Comments* at 5 ("Under the pricing flexibility regime, prices have fallen."); *SBC Comments* at 21 ("[T]he average true price to the customer of SBC's special access services has dropped.").

25/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of Verizon*, *Declaration of William E. Taylor on Behalf of Verizon*, at 18, ¶ 38 (filed June 13, 2005) ("*Taylor Declaration*") (confirming that the data Verizon uses for circuit price comparisons "is entirely based on average revenue per unit of service, rather than tariffed prices"); *SBC Comments* at 21 ("Internal SBC revenue numbers show declining average DSn prices across SBC's entire service area."); *Casto Declaration* at 38, ¶ 56 (discussing a study of "average prices" that, based on the methodological discussion contained in n.47, appears to be an average revenue calculation). Qwest "withheld comment on the pricing flexibility issues" in the NPRM. *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of Qwest Communications International Inc., at 4 (filed June 13, 2005) ("*Qwest Comments*").

26/ *Farrell Declaration* at 9, ¶ 22.

27/ W. E. Taylor and J. Douglas Zona, *An Analysis of the State of Competition in Long-Distance Telecommunications Markets*, 11 JOURNAL OF REGULATORY ECONOMICS 227, 238-40 (1997).

access prices to forward-looking costs is being attained.[28/] Thus, as noted by Dr. Farrell, the key issue is the relationship between special access rates and corresponding forward-looking costs.[29/]

In this regard, the BOCs have been singularly unhelpful because, apart from criticizing ARMIS cost data, the BOCs have provided no information on the central question of the relationship between forward-looking costs and their special access rates. Fortunately, the Commission can compare BOC special access rates with the prices of comparable facilities that are based on forward-looking costs – UNE rates based on TELRIC and competitors' prices.[30/] This comparison shows that special access rates remain far above forward-looking costs and that competition has had little, if any, effect toward achieving the Commission's goal of forward-looking, cost-based special access rates.

1. Average Revenue per Unit Is a Flawed Proxy For Price Movements

The major difficulty with using average revenue per unit to measure changes in prices is that price changes are only one of many factors that may cause a change in average revenue. Even the BOCs recognize this, though inexplicably they don't appear to consider it a problem.[31/] BellSouth observes that its "downward trend in [average] revenue reflects *several* changes in the special access services purchase over the last four

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[28/] *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994, 1999-2000, ¶ 13 (2005) ("*Special Access NPRM*").

[29/] *Farrell Declaration* at 18, ¶ 47.

[30/] *See id.*

[31/] Even Verizon's own economic consultant recognizes that "identifying changes in average revenue per unit subject to pricing flexibility with changes in service prices in pricing flexibility areas is problematic." *Taylor Declaration* at 16, ¶ 33.

years," admitting that it is only "*some portion* of the [average] revenue decrease [that] is attributable to price decreases on a per unit basis."[32/]

Various parties have pointed out the flaws in using average revenue metrics in this and related proceedings. In a December 2004 *ex parte* submission to the Commission, for example, AT&T identified a number of drawbacks of using average revenue per voice grade equivalent as a proxy for price in special access markets, among which are:

- There is no logical relationship between average revenue and price because average revenue figures do not account for shifts into and out of discount programs that may be available.

- Because special access charges almost always include a per-mile charge component, the average revenue per unit will vary according to the mix of circuits that are averaged. A shift from longer to shorter circuits will show as a decline in average revenue, without representing any decrease in prices.

- Changes in average revenue may be caused by shifts in the mix of services included. Averages that are adjusted to a per unit basis – such as "voice grade equivalent" (VGE) – still do not account for shifts between, for example, OC12 services (with a relatively low cost per VGE) and DS1 services (with a relatively high cost per VGE). Of course, averages that to not attempt to adjust to a per unit basis, or isolate and compare only like services, are ultimately flawed as changes in the mix between high-cost services and low-cost services will completely obscure any changes in prices.[33/]

Dr. Farrell confirms AT&T's analysis and further explains how average revenue calculations paint a distorted picture of price declines given the manner in which ARMIS counts lines.[34/] He notes that Dr. Taylor relied on the number of access lines reported in

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[32/] *BellSouth Comments* at 22 (emphasis added).

[33/] Letter from C. Frederick Beckner, Counsel for ST&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313 (filed Dec. 7, 2004).

[34/] *Farrell Declaration* at 11, ¶¶ 26-27.

ARMIS 43-08, columns *fj* and *fk*,[35/] which requires carriers to calculate the number of special access lines as follows:

> "The number of 64 kbps or equivalent digital special access lines terminated at the customer designated premises. . . . Where DS-3 or DS-1 service is provided without individual 64 kbps circuit terminations, multiply the number of DS-3 terminations by 672 and the number of DS-1 terminations by 24 when calculating the value for this column."[36/]

For DS1 and DS3 lines that are provided without individual circuit terminations, ARMIS can overestimate the line count since it assumes that the entire capacity is used, whether or not it is, in fact, used. Accordingly, the average revenue per voice-grade circuit is reduced. Without actual line information it is not possible to know the extent of this downward bias or whether it has increased over time. Dr. Farrell observes, however, that since data communications lines often do not need individual 64 Kbps terminations, and since data communications grew more rapidly than voice communications during the period at issue, there was likely an increase in the fraction of lines for which the ARMIS reporting requirements resulted in an overcount of special access lines. If so, the ARMIS line count would grow at a faster rate than would be warranted by the actual growth in demand for capacity, causing the calculated average revenue per ARMIS line to decline more quickly than the average revenue per unit of capacity actually demanded.[37/]

Dr. Farrell also provides an example of the possible magnitude of distortion caused by the ARMIS line count definition or shifts in demand to higher capacity circuits generally. Assume a customer with six DS1s requires an additional DS1 of capacity, but based on relative prices of DS1s to DS3s, it will be economical to purchase a single DS3

35/ *Id.* at 10, ¶ 25 (*citing Taylor Declaration* at 7, n.10).

36/ *Id.* (*citing* FCC Report 43-08.)

37/ *Id.* at 11, ¶ 26.

rather than seven DS1s. In such a situation, even though no prices actually changed, Dr. Taylor's methodology would show a change in prices as measured by the average revenue per ARMIS line of minus 10.4% when channel terminations are provided by the BOC, or minus 77.6% when channel terminations are not provided by the RBOC.[38/] In this example, the average revenue per line falls regardless of the way in which ARMIS records the number of lines demanded by the customer, even though no prices have fallen. In general, the average revenue per ARMIS line will understate the prices paid by consumers, and in times of growing demand, overstate the reduction (if any) in the average revenue per line.[39/]

Dr. Taylor attempts to correct for some of these problems by providing average revenue per DS1 and DS3 lines, and then claims that DS1 and DS3 prices declined "dramatically" between 2000 and 2001, and much faster than required by the price cap formula. Dr. Taylor posits as possible explanations a national recession and the telecommunications industry meltdown.[40/] Dr. Farrell notes, however, that since DS1 lines are sold at different prices (with lower prices for longer term commitments and larger volumes purchased), a shift in demand from high price contracts to low price contracts can result in a reduction in average revenue per line even though no prices were reduced.[41/] The same explanation applies to DS3 lines. Dr. Farrell concludes that Dr.

38/ *Id.* at 11, ¶¶ 26-27.

39/ *Id.* at 10-13, ¶¶ 25-37.

40/ *Taylor Declaration* at 7, ¶ 14.

41/ *Farrell Declaration* at 13, ¶ 36.

Taylor's disaggregation of special access lines into DS1 and DS3 lines does not repair the flaws in relying on an average revenue measure.[42/]

Dr. Taylor in fact acknowledges that average revenue reductions result in part from customers "voluntarily" moving into discount plans, but claims that such volume discounting shows consumers are paying lower prices and that the competitive process is working.[43/] Dr. Taylor, however, has previously held a completely contrary view. In previously assessing whether competition had driven down long distance prices, Dr. Taylor criticized the use of average revenue per minute as a surrogate for prices and in particular he noted the problem that average revenue included the effects of "volume discount plans."[44/] He wrote: "Suppose the prices in the plan remain fixed, but customers are able to receive lower effective marginal prices when their demand expands. . . . In that case [average revenue per minute] would decline not because the price of usage declined, but because customer demand increased."[45/] Dr. Taylor recognized that average revenue declines do not necessarily provide evidence of effective competition.[46/]

Nor is there any reason to assume that average revenue declines fell faster than price caps, suggesting that competitive pressure is driving prices down faster than price cap regulation.[47/] A review of Verizon data shows that, for special access lines taken as whole, the actual changes in prices almost exactly equal the reduction required by the

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42/ *Id*.

43/ *Taylor Declaration* at 19, ¶¶ 39-41.

44/ Taylor and Zona, *supra* note 27, at 238.

45/ *Id*., *supra* note 27, at 238.

46/ *Id*. at 229.

47/ *See Taylor Declaration* at 9, ¶ 17.

price cap plan. Thus, to the extent there has been a restraint on special access prices overall, it is the result of regulation, not competition.[48/]

In short, the BOCs' average revenue per unit methodologies are not reliable indicators of actual price declines. But even if they were, price declines by themselves provide no evidence of lack of market power, as explained below.

2. There is No Evidence That Prices Are Trending Toward Forward-Looking Incremental Costs.

Even if average revenue declines did demonstrate price declines, price reductions do not prove lack of market power.[49/] Instead, it is the relative levels of price and cost – and in particular forward looking cost – not the rate of change of price, that is most relevant.[50/] The Commission seeks to determine whether competition is driving prices to forward looking costs.[51/]

The Bell companies have provided the Commission no information in this proceeding on their forward-looking costs. Although they criticize the use of ARMIS cost data to make conclusions about their margins, none of the BOCs accepted the FCC's invitation to allocate costs in a different manner.[52/] Fortunately, the BOCs' refusals to provide any information on their forward looking costs do not preclude the Commission from assessing whether competition is driving BOC special access rates toward forward looking costs. As Dr. Farrell points out, there are two proxies that can reasonably be

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48/ *Farrell Declaration* at 14-15, ¶ 39.

49/ *Id.* at 16, ¶ 41.

50/ *Id.* at 16, ¶ 42.

51/ *Special Access NPRM* at 2017, ¶ 65.

52/ *See id*. at 2007, ¶ 29.

used to make this assessment: UNE rates and competitors' rates for comparable services.[53/]

UNE rates are based on forward looking costs and can reasonably be used to gauge whether special access rates for identical facilities are being driven toward forward looking costs.[54/] A comparison of UNE rates to comparable special access rates shows that special access rates remain far in excess of forward looking costs. The record in this and related proceedings provides abundant evidence that UNE rates typically are substantially lower than comparable special access rates.[55/]

Competitors prices for comparable services are also a reasonable proxy for assessing whether BOC special access rates are being driven to costs.[56/] In fact the FCC has previously benchmarked carrier access rates based on substantially lower prices charged by their competitors. In the *CLEC Access Charge Order*,[57/] the FCC, finding that "both terminating and originating access markets [consist] of a series of bottleneck monopolies over access to each individual user," adopted ILEC switched access rates as the benchmark for CLEC access charges.[58/] The FCC found that benchmarking CLEC

53/ *Farrell Declaration* at 18, ¶ 47.

54/ *Id*. (noting that UNE rates are often based on forward-looking economic costs calculated using an engineering-economics cost proxy model).

55/ *Id*.; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of Nextel Communications Inc.*, at 16 (filed June 13, 1005) ("*Nextel Comments*") (*citing Unbundled Access to Network Elements*, WC Docket No. 04-313, *Comments of T-Mobile USA Inc.*, at 22 (filed Oct. 4, 2004)); *Nextel Comments* at 17 (*citing Stith Declaration* at 1, ¶ 2).

56/ *Farrell Declaration* at 18, ¶ 47.

57/ *Access Charge Reform: Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking,16 FCC Rcd. 9923 (2001).

58/ *Id.* at 9935, ¶ 30.

switched access rates to those of the competing ILEC in the same area constituted a reasonable means of "moving the market closer to a competitive model."[59/]

The evidence submitted in this proceeding demonstrates that competitors' rates are well below BOC special access rates. CompTel's initial comments, for example provided evidence that competitors' prices for special access facilities were significantly lower than the BOCs' rates for comparable services.[60/] CompTel's data show that "BOC prices typically are two to three times higher than competitive carriers . . . for the same facility."[61/] T-Mobile similarly agreed that prices in competitive markets can serve as an effective benchmark.[62/]

A "market share" study by BellSouth corroborates that BOC special access rates are substantially above either the UNE or competitor pricing benchmark and demonstrates that comparable competitor rates are reasonably obtainable.[63/] In order to demonstrate BellSouth's purported market share based on revenue,[64/] BellSouth

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59/ *Id*. at 9925, ¶ 7.

60/ *Fischer Declaration* at 4.

61/ *Id*.

62/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of T-Mobile USA Inc., Declaration of Simon J. Wilkie at 5 (filed June 13, 1005) ("*Wilkie Declaration*") ("The best means of addressing whether special access rates are competitive would be to compare these prices with data from 'benchmark' competitive markets to determine whether the special access prices are above or below the competitive benchmark.").

63/ *See BellSouth Comments* at 23-37.

64/ BellSouth submitted insufficient supporting information to assess the reasonableness of the study's purported conclusions concerning BellSouth's share of the special access market. *See id.* at 24-27.

compared its special access rates with rates of competitors.[65/] To find comparable competitor rates, BellSouth obtained from a network circuit wholesaler actual prices of DS1, DS3, and OCn circuits sold in BellSouth's territory, reduced the prices by an estimation of the wholesaler's mark-up margin, and then verified the result with interviews with BellSouth carrier customers and "third party industry contacts."[66/]

The results are revealing: BellSouth's average special access price is $240 for a DS1 circuit, compared to competitors' average of $140 for DS1 circuits and $141 for a UNE DS1 circuit.[67/] For DS3 circuits, BellSouth charged $1,356, while competitors charged $700 and the average UNE price was $628.[68/] For OCn level circuits, BellSouth's average special access price per circuit sold was $5,077 and competitors' average price was $3,300.[69/] As BellSouth utilized average prices per special access circuit *sold*, its price presumably included any discounted rates. BellSouth's prices nevertheless are substantially above either UNE rates or competitors' rates, even for DS3 and OCn level circuits where BellSouth claims to have a minority share of the market.[70/]

In the absence of any evidence of forward looking costs proffered by the ILECs, the Commission can and should use competitors' rates and/or UNE rates as a benchmark for forward looking costs against which ILEC prices may be assessed.

65/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of BellSouth, Declaration of Stephanie Boyles, at 3, ¶ 6 (filed June 13, 2005) ("*Boyles Declaration*").

66/ *Id.* at 4, ¶ 8.

67/ *Id*. at 4, ¶¶ 7, 8.

68/ *Id*.

69/ *Id*.

70/ *See* discussion, *supra* at Part I.A. *See also Farrell Declaration* at 19-20, ¶ 51 (noting that the RHK study failed to explain how BellSouth was able to sustain a substantial premium over competitors that BellSouth claims dominate the market.)

II. BOC Claims That Special Access Markets Are Competitive Are Belied by Other Evidence Submitted in This Proceeding.

The BOCs assert that there is substantial competition in special access markets.[71/] The extent of competition in special access markets is sufficient, the BOCs claim, that deregulation of all special access markets is warranted.[72/] The BOCs' sweeping assertions about special access competition contrast sharply, however, with the facts submitted by a variety of carriers and end users that remain overwhelmingly dependant on BOC facilities nearly ten years after the passage of the 1996 Act and fifteen years after the FCC hoped to pry open special access markets in its *Expanded Interconnection* proceeding.

One striking feature of these comments is their near uniformity on the extent of continued reliance on BOCs by very different market participants. End users, long distance companies, local exchange competitors, and wireless companies all report that they remain reliant on BOC special access for more than 90% of their last-mile connections. Sprint reports that "[d]espite Sprint's aggressive attempts to diversify its access suppliers over the past several years, and its policy of using alternative vendors whenever it is financially and operationally feasible, as of the end of 2004, Sprint relied upon the RBOCs for almost 95% of its DS1 circuits, and 83% of its DS3 circuits."[73/] The Ad Hoc Telecommunications Users Group, which represent large business end users that collectively purchase $2 to $3 billion in ILEC special access,[74/] found that ILECs "remain the sole source of special access connectivity at roughly 98% of all business premises

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71/ *See, e.g., SBC Comments* at 13; Verizon Comments at 23.

72/ *See, e.g., BellSouth Comments* at 37; Verizon Comments at 38-39.

73/ *Sprint Comments* at 7.

74/ *Ad Hoc Telecomm Comments* at 2-3.

nationwide and . . . this condition affects even the largest corporate users."[75/] It wrote that "the current availability of special access services from competing providers remains confined to a small number of buildings in an even smaller number of concentrated business districts."[76/] PAETEC Communications reports that even in the high-density markets most attractive to competitive offerings of special access services, it is "dependent on ILECs for 95 percent of its special access service lines."[77/] T-Mobile is forced to purchase 96% of its DS1 channel terminations and 94% of its DS3 channel mileage services from ILECs.[78/]

Further evidence of the paucity of competitive supply is provided by Broadwing, which relates its experience in seeking proposals from competitive special access service suppliers to move 10,000 special access circuits from Verizon. Broadwing was unable to obtain a proposal by an alternative provider that could supply more than 10% of its needs. In light of the limited ability of competitors to meet Broadwing's needs, the company determined that it could not realistically move any of its transport links to competitive

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75/ ECONOMICS AND TECHNOLOGY, INC., COMPETITION IN ACCESS MARKETS: REALITY OR ILLUSION 12 (2004) ("*ETI Study*") (filed as an attachment to *Ad Hoc Telecomm Comments*).

76/ *ETI Study* at 12. This finding reflects that fact that even large companies have numerous scattered smaller sites requiring lower capacity circuits that only the ILECs, through their ubiquitous networks, can satisfy. *Ad Hoc Telecomm Comments* at 11.

77/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of PAETEC Communications, Inc., at 6 (filed June 13, 2005) ("*PAETEC Comments*").

78/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of T-Mobile USA Inc*., at 8 (filed June 13, 1005) ("*T-Mobile Comments*").

carriers, even where they offer lower prices.[79/] Broadwing's comments highlight the strength of the ILECs' competitive advantage in being the only entities with truly ubiquitous networks, a strength that they leverage through region-wide discount lock up plans as explained in CompTel's initial comments and further discussed below.

The paucity of competitive alternatives reflects the well-documented entry barriers that sharply restrict competitive fiber deployment to individual buildings. The record in both *Triennial Review Order* and the *Triennial Review Remand Order* substantiate the existence and effect to economic and operational entry barriers to deploying fiber to buildings. The result of these barriers to deployment is reflected in the comments of WilTel and Time Warner. WilTel submitted a study finding that competitive special access services are available in only 27,000 buildings within the 36,000 ILEC central offices in which WilTel potentially serves customers.[80/] Time Warner Telecom points out that a recent report filed by BOCs with the Commission showed that "CLECs only serve 32,000 buildings out of between 739,000 and 3 million commercial buildings nationwide."[81/]

In contrast to these well-documented facts, BellSouth supplies a study by RHK, Inc.[82/] that purports to show BellSouth's market share of tail circuits, which are circuits between the end user premises and end office, and interoffice/entrance facilities, circuits

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79/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of Broadwing Communications, LLC, and SAVVIS Communications Corporation, at 18 (filed June 13, 2005) ("*Broadwing Comments*").

80/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Initial Comments of WilTel Communications, LLC, at 10 (filed June 13, 2005) ("*WilTel Comments*").

81/ *Time Warner Comments* at 13.

82/ The study was conducted by a former 16-year employee of BellSouth. *Boyles Declaration* at 1-2, ¶ 2.

from the end office to the carriers' switch or POP, at the DS1, DS3 and OCn level.[83] The study claims to show market shares of combined tail and entrance facility circuits based on product units sold, total capacity expressed in DS1 equivalents, and total revenue. The study includes carriers using UNEs as separately being in the special access market.

BellSouth submitted virtually no detail or back up information to substantiate the methodology or results of the study. Even taken on is own terms, however, the study shows that competitors using non-BellSouth facilities have only an 11% market share for DS1 tails, demonstrating substantial market dominance.[84/] Although BellSouth ascribes to carriers using UNEs a share of this market, this is inappropriate because UNEs are not available to provide most special access services, *e.g.,* long distance or wireless. At any rate the study results in the anomalous situation of a carrier claiming to have very small market shares[85/] maintaining prices that are double or more of the "dominant" carriers. The study found that BellSouth's average DS3 circuit price of $1,236 is 48% higher than the "verified" competitor price of $700; and that BellSouth's average OCn circuit price of $5,077 is 54% higher than the "verified" competitor price of $3,300.[86/]

III. Bell Company Contract Terms Are Anticompetitive and Otherwise Unjust and Unreasonably Discriminatory.

As noted above, one of the most pernicious effects of increasing BOC base rates is to enhance the BOCs' bargaining power to impose anticompetitive and unlawful provisions in its discount plans, particularly the individualized pricing flexibility contract

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83/ *BellSouth Comments* at 23.

84/ *BellSouth Comments* at 27.

85/ For example, BellSouth claims to have only a 12% share of the overall special access market measured on a capacity (DS1 equivalent) basis, *BellSouth Comments* at 30, and 21% of the OCn special access tail market, *BellSouth Comments* at 28.

86/ *Boyles Declaration* at 4.

tariffs. BOC volume and term plans, and their pricing flexibility contracts in particular, are designed to, and have the effective of, keeping competition down. They do so by requiring carriers to maintain the vast majority of their special access spend with the BOC, requiring carriers to transfer traffic from competitors' networks or incorporating illegal growth discounts to achieve the same effect, and enforcing these conditions with onerous penalties far in excess of any that might be needed to ensure that the BOC receives the benefit of its bargain.

Additionally, the plans are unreasonably discriminatory, as the BOCs incorporate provisions directly designed to avoid the requirement that tariffed contracts must be made available to similarly situated carriers. Moreover, many of these plans require carriers to forgo the use of UNEs even in circumstances where the Commission has found impairment, and thus directly undermine the key public policy objective of the 1996 Communications Act to open local markets to competition. The Commission must carefully review these plans but, at the end of the day, the most effective remedy will be to reinitialize the BOCs' tariffed rates so as to mitigate their ability to coerce carriers into these discount plans in the first place.

A. Exclusionary Effects

The BOCs argue that their term and volume plans and individualized pricing flexibility contracts are reasonable responses to competition that customers freely enter and indeed demand.[87/] They claim that the Commission has long endorsed volume and terms plans.[88/] True enough, but the Commission has also recognized that volume and

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[87/] *See e.g.*, *SBC Comments* at 50-57; Verizon Comments at 33-35; BellSouth Comments at 50.

[88/] *See, e.g.*, *SBC Comments* at 52.

terms plans can have anticompetitive effects by locking up demand in markets that the Commission has targeted for competition.[89/] Sadly, as shown by the data noted above on the extent to which carriers must still rely BOC special access, the Commission's efforts to generate competition has had limited success, particularly at lower capacity levels and outside dense downtown areas. Bell company tariffs that lock up demand have operated to reduce competition, and the BOCs can achieve this effect regardless of whether they engage in predatory pricing or illicit tying.[90/]

Numerous parties have confirmed that these plans have the exclusionary effects identified by Dr. Pelcovitz and discussed in CompTel's comments. CompTel explained, pointing to previous submissions of MCI and AT&T, that ILEC revenue commitment requirements and associated shortfall penalties along with bundling of competitive with non-competitive routes could force ILEC customers to forgo less expensive sources of alternative, efficient supply.[91/] WilTel submitted the declaration of their Director of Access Planning, Mark Chaney confirming that ILEC discount plans have the pernicious

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89/ *See, e.g.*, *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd. 7369, 7463-64, ¶ 201 (1992) ("The existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to 'lock up' the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment.").

90/ *See Farrell Declaration* at 2-3, ¶ 4; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of CompTel/ALTS, Global Crossing North America, Inc., and NuVox Communications, at 11-14 (filed June 13, 2005) ("*CompTel Comments*"); *AT&T Petition for Rulemaking to Reform Regulation for Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, Reply Comments of WorldCom, Inc., Declaration of Michael D. Pelcovitz on Behalf of WorldCom, Inc. (filed Jan. 23, 2003) ("*Pelcovitz Declaration*").

91/ *CompTel Comments* at 12-20.

effect CompTel identified in its comments.[92/] The Mr. Chaney reports that "[e]ven where a CLEC may offer a competing special access service (as a substantial discount to the ILEC offering), WilTel may not use that CLEC in many cases because it can incur a lower incremental expense by committing additional services to an existing ILEC plan even though the overall unit cost from the ILEC may be higher."[93/] Other commenters have pointed to the anticompetitive effects of BOC term and volume plans.[94/] PAETEC notes that "[t]he economics of these [discount] arrangements are compelling in the short-term but are designed such that if competitive alternatives were later to develop, . . . carriers would not be able to take advantage of those alternatives for several years."[95/]

In the accompanying declaration, Dr. Farrell further demonstrates the exclusionary effect of certain BOC discount plans, such as SBC's Managed Value Plan ("MVP"). He notes that such plans exacerbate the inherent economic and operational barriers to entry into the special access market.[96/] Plans that include excessive termination charges, commitments to purchase some minimum quantity from the ILEC with substantial shortfall penalties, and volume or loyalty discounts under which a special access consumer pays the ILEC more for service at one location if it uses a competing carrier at another location further impede competition.[97/] Even if plans have some

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92/ *Chaney Declaration* at 2-3, ¶ 6.

93/ *Id*.

94/ *See ATX Comments* at 35-38 (describing an SBC plan that compels customers to stay on SBC's network in all parts of country and places restrictions on UNE access).

95/ *PAETEC Comments* at 9.

96/ *Farrell Declaration* at 2, ¶¶ 3-4.

97/ *Id.* at 2, ¶ 4.

efficiency rationales (which has not been demonstrated), such discount plans can impede competition and "weaken entry as a constraint on an incumbent's overall price level."[98/]

Dr. Farrell conducted a detailed analysis of SBC's MVP plan[99/] and concludes that the MVP "is structured in a way that makes it unprofitable for a competitor to win any modest portion of a customer's business, even if the incumbent's price exceeds the competitor's long-run cost."[100/] Essentially, the MVP sets up "an automatic and sometimes drastic price cut for any portion of the customer's business that the customer is considering switching to a competitor."[101/] Dr. Farrell describes two scenarios, one where a customer is considering moving part of its historical spend to a competitor (which would preclude using the MVP for any part of its SBC special access services)[102/] and the other when a customer already in the MVP is considering moving part of its net new growth in demand to a competitor. In the first scenario, the competitor would have to offer a 59% off of SBC's pre-MVP price[103/] in order to win the business.[104/] In the second scenario, the competitor would have to price 53% lower than SBC's pre-MVP price.[105/] Dr. Farrell concludes that if the competitor cannot win all of the customer's

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98/ *Id.*

99/ *Id.* at 3-5, ¶¶ 5-10.

100/ *Id.* at 5, ¶ 11.

101/ *Id.*

102/ The MVP requires that a customer place 100% of its historical spend in the MVP. *Id.*

103/ It is important to recall that MVP discounts are on top of any other qualifying discount program.

104/ *Farrell Declaration* at 5, ¶ 11.

105 *Id.* at 6, ¶ 14.

business (which is often the case)[106/] the competitor "is effectively foreclosed from serving that customer.[107/] The MVP also allows the ILEC to charge a price that is "well above a competitive carrier's cost and the competitor will nevertheless find it unprofitable to enter on a small scale, because the customer is penalized on its inframarginal SBC business for giving marginal business to the competitor."[108/]

Finally, Dr. Farrell notes that effects of the MVP can be magnified when the underlying tariffs contain similar discounts and penalties, such as SBC's DS1 Term Payment Plan. Under that plan, customers can enroll in a DS1 portability program that allows customers to terminate specific circuits without penalty as long as it maintains the overall level of DS1 channel terminations. The plan requires carriers to maintain between 80% and 124% of their preexisting channel terminations. Channel terminations that fall below 80% or above 124% that level (unless the minimum is raised) are substantially penalized, as is early termination of the overall plan.[109/] These penalties "are likely to be high enough to make the customer unprofitable for the competitor to win, even when the ILEC's overall level of prices for special access is above the competitor's long-run cost." Dr. Farrell thus concludes that such plans "artificically increase a customer's cost of switching, and raise competitors' cost of acquiring customers."[110/]

106/ *See Broadwing Comments* at 16-18 (describing Broadwing's attempts to obtain bids from competitive special access providers and failing to find any providers that could supply more than 20% of Broadwing's total circuit requirements).

107/ *Farrell Declaration* at 6-7, ¶ 15.

108/ *Id.* at 7, ¶ 16.

109/ *Id.* at 8, ¶ 18-19.

110/ *Id.* at 8, ¶ 20.

The Commission should deal directly with provisions that create the exclusionary effects -- *e.g.*, unreasonable shortfall and termination penalties. But more importantly, or effectively, the Commission must remove the BOCs' bargaining power to impose these provisions by lowering base rates to forward looking cost levels.

B. Unlawful Terms and Conditions

In addition to these anticompetitive exclusionary effects, BOC contracts include expressly prohibited terms, such as growth discounts, and fail to make discounts reasonably available to similarly situated customers.[111/] Additionally, many ILEC discounts unreasonably require CLECs to relinquish the right to UNEs, or impose unreasonable incentives to discourage their use. Congress obligated ILECs to provide UNEs where carriers are impaired in order to further the pro-competitive policies of the 1996 Act. Contract provisions that tie discounts to relinquishing UNE access violate public policy and should be nullified.

BOC plans routinely violate one or more of these requirements in their discount plans. An instructive example is a contract plan touted by Verizon in its comments in this proceeding. Ironically, Verizon presumably forwarded this plan to be an example of the Verizon's responsiveness to customer requests for better prices through individualized contract offers.[112/] A careful reading of this plan, however, demonstrates that it contains patently unlawful terms.

111/ *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order, 14 FCC Rcd. 14221, 14292, ¶ 130 (1999) ("the Commission will enforce the requirement that [BOCs] make contract tariffs available to similarly situated customers.") ("*Pricing Flexibility Order*"); *id*. at 14294, ¶ 134-35 (barring growth discounts).

112/ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Comments of Verizon, Declaration of Quintin Lew* at 57-58, ¶ 72 (filed June 13, 2005) ("*Lew Declaration*").

For one, the contract includes provisions, commonly utilized, to preclude similarly situated customers from using the plan. It does so by providing for an extremely short time frame, one month, by which to opt into the contract, and by limiting the contract to carriers that take and have taken specified amounts of service from the BOC.[113/] Both of those restrictions unreasonably limit an otherwise similarly situated customer from opting into the contract tariff.

The contract also includes an illegal growth discount. The Commission defines growth discounts as "pricing plans under which incumbent LECs offer reduced per-unit access service prices to customers that commit to purchase certain percentage above their past usage, or plans that offer reduced prices based on growth in traffic placed over an incumbent LEC's network."[114/] Overall, Verizon's contract tariff offers added discounts in terms of billing credits so long as the customer purchases between \$43 million and \$69 million of Verizon special access services during the year. Billing credits increase if more than \$20 million of that amount is for DS1 services. For example, the customer would receive a billing credit of \$3 million if it purchased \$59 to \$60.99 million of Verizon special access and more than \$20 million of that was for DS1 service.[115/] The contract contains an effective growth discount by providing a 15% "incentive" for new services – effectively for every \$1.00 of new service purchased, \$1.15 is counted toward

113/ *See e.g.*, Verizon Tel. Cos. Tariff FCC No. 1 § 21.24, at Original Page 21-172 (requiring carriers to subscribe between April 2, 2005 and May 1, 2005 and requiring for qualification that the carrier have been billed no more than \$750,000 in DS1 and DS3 direct trunk transport in 2004, and have total billed revenue during the discount term of between \$43 million and \$69 million).

114/ *Id*. at 14294, ¶ 134.

115/ *See* Verizon Tel. Cos. Tariff FCC No. 1 § 21.24(E)(2), at Original Page 21-183 through Original Page 187.

meeting the revenue commitment. This 15% "incentive" is crucial given the severe penalties for not meeting the minimum commitment. If the customer falls short of the $43 million minimum for the year, it must pay 50% of the difference between the actual buy and the minimum. Thus, if the customer only purchased $40 million in the year, it would owe Verizon $1.5 million, 50% of the $3 million shortfall. By increasing the value of each dollar spent on new purchases in terms of meeting the revenue commitment, the contract effectively includes a growth discount. This provides an incentive not only to put new growth on Verizon's network, but potentially to move existing circuits off of competitor's networks.[116/]

Finally, the Verizon contract contains an even higher incentive for forgoing the use of unbundled network elements. It provides an additional 50% "incentive" for converting DS1 UNEs to special access.[117/] In other words, for every $1 of UNEs converted to special access, the plan will count $1.50 toward meeting the revenue commitments. This is but one variant of plans that effectively require carriers to abandon their right to UNEs.[118/] Given the Commission's finding that UNEs act to discipline special access prices, and that more generally, Congress has adopted a policy of UNE

116/ Other plans contain provisions expressly requiring carriers to move off of competitors' networks more directly. *See, e.g.*, Southwestern Bell Telephone Company, Tariff FCC No. 73, § 41.15.3(C), at Original Page 41-89 through Original Page 41-90 (requiring the plan participant to transfer at least 4% of its traffic on competitors' networks onto SBC's network, or face enormous penalties.)

117/ Verizon Tel. Cos. Tariff FCC No. 1 §§ 21.24(E)(1)(e)-(f), at Original Page 21-178 through Original Page 21-179.

118/ *See, e.g.*, *SBC MVP* § 38.3(C), (D) at Original Page 38-4 through 3rd Revised Page 38-7 (requiring 95% of SBC circuits be purchased as interstate special access to qualify for the discount). See also, e.g., Southwestern Bell Tel. Co. Tariff FCC No. 73 § 41.31.3(H), at Original Page 41-233 through Original Page 41-235 (requiring 98% of SBC circuits be purchased as interstate special access to qualify for the discount).

access to open markets to competition, terms such as these in BOC contracts designed to eliminate UNE access are contrary to sound public policy and should be deemed unjust and unreasonable. Moreover, provisions that directly penalize carriers for using UNEs also serve as a poison pills, rendering these contracts unusable to otherwise similarly situated carriers in terms of special access volume etc. but that also use UNEs to compete in the local market.

CONCLUSION

There is substantial evidence in the record of a market failure in special access services that requires the Commission to eliminate Phase II pricing flexibility and reinitialize rates to forward looking costs.

/s/

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CERTIFICATE OF SERVICE

I, Ernest C. Cooper, hereby certify that on this 29th day of July 2005, the foregoing Comments of CompTel, were filed electronically through the FCC's Electronic Comments Filing System (ECFS) and copies were served on the following as indicated:

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